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No. 79-1879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE BOHACK CORPORATION,

Intervenor-Petitioner,

IOWA BEEF PROCESSORS, INC.,

Plaintiff-Respondent,

v.

HUGHES A. BAGLEY,

Defendant-Respondent,

—AND—

PATRICK E. GORMAN, HARRY R. POOLE, and SAM TALARICO, as representatives of the members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS and JOHN A. COCHRANE,

Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Iowa Beef Processors, Inc. ("IBP") submits that the petition must be denied because the Eighth Circuit's decision finding a lack of appellate jurisdiction was entirely correct and Petitioner Bohack fails to raise any issue justifying review by this Court.

COUNTER-STATEMENT OF THE CASE

This diversity lawsuit was filed in the Northern District of Iowa by IBP against Hughes A. Bagley and several other persons because Bagley had wrongfully disclosed to third parties confidential IBP business information and documents which he had obtained during his tenure as a high-ranking IBP officer. Bagley violated both contractual and fiduciary duties to IBP when he disclosed the confidential material to the other defendants, who had induced him to do so.

Shortly after IBP's suit was filed, Bagley responded to IBP's Rule 34 document request by producing 7 large boxes of documents that he had taken with him when he left IBP. The thousands of pages of documents included attorney-client materials and many other documents containing confidential IBP business information on such subjects as pricing, costs, profits, and financial, budgetary, and customer data.

Upon learning of the confidential nature of Bagley's documents, IBP filed a motion under Rule 26(c)(7), F.R.Civ.P., for a protective order limiting further disclosure of the documents, and Chief Judge McManus granted the motion.

Petitioner Bohack, a New York supermarket chain, is *not* a party to this litigation. Instead, it is pursuing in the Eastern District of New York a Robinson-Patman case against IBP and several other defendants claiming that IBP had discriminated in the price of beef in favor of a competing supermarket chain in New York. (*Bohack Corp. v. Iowa Beef Processors, Inc., et al.*, No. 77 Civ. 1673 (E.D.N.Y.).) Bohack's case was filed in

August, 1977, but in the nearly 3 years since then it has accomplished virtually no discovery. Specifically, Bohack has taken no depositions and has not examined any IBP documents, although the documents it requested were tendered by IBP for examination on reasonable notice in March, 1979.

Despite its dilatory record in discovery in its own case, Bohack came to the District Court in this litigation as a stranger claiming an urgent need to pierce the District Court's protective order to obtain the confidential IBP documents in Bagley's hands without any restrictions on its use of the documents, but it made no showing whatsoever of the relevance of the documents to Bohack's antitrust case or a necessity to obtain them from Bagley.

Bohack first attempted to obtain the Bagley documents through a motion it filed in the Eastern District of New York in its Robinson-Patman case against IBP, requesting an order authorizing issuance of a subpoena to Bagley which would compel him to appear for deposition and to produce the documents. IBP opposed the motion for various procedural reasons, including the fact that Bagley, a resident of Iowa, was outside the jurisdiction of the Eastern District of New York. Judge Mishler of the Eastern District of New York denied Bohack's motion.

Bohack then served on the defendants in its antitrust case a notion of Bagley's deposition, but it did not mention that Bagley would be called upon to produce documents. Bohack also apparently mailed to Bagley a purported subpoena requiring Bagley to testify at a deposition and produce documents in Sioux City, Iowa on July 13, 1978. However, the copy of this supposed subpoena that is in the record indicates that it was a

document drafted by Bohack, rather than a form subpoena issued by the Court, that it was in the name of the United States District Court for the Eastern District of New York rather than the Northern District of Iowa, and that it was not signed by the Clerk of any court. Furthermore, there is no return of service in the record. The subpoena violated the requirements of Rule 45, F.R.Civ.P., in each respect.

Bagley's attorney responded to Bohack by letter stating that he would not allow his client to give deposition testimony or produce documents without clearance from Chief Judge McManus that the protective order in this case would not thereby be violated. However, Bagley made no effort to quash the subpoena or to seek a protective order limiting the subject matter which could be covered by a deposition or subpoena duces tecum.

Bohack did not attempt to proceed with the scheduled Bagley deposition on July 13, 1978 but instead filed a motion in this case before Chief Judge McManus asking for an order granting Bohack leave to intervene for the limited purpose of moving to modify the protective order and compelling Bagley to appear for the deposition, to give testimony on Bohack's behalf, and to produce those records in his possession that relate to Bohack's antitrust action in New York. However, Bohack offered no evidence showing the relevance of any of Bagley's documents to the Bohack action. The only materials submitted by Bohack in support of its motion were a copy of its amended complaint in its Robinson-Patman case, a copy of Chief Judge McManus' order which granted IBP's motion for a protective order, the notice to take the Bagley deposition in Bohack's case, a copy of the subpoena supposedly mailed to Bagley, and the

letter from Bagley's attorney refusing to allow his client to appear for the deposition or produce documents without a court decision lifting the protective order for that purpose.

Chief Judge McManus on September 26, 1979 granted Bohack leave to proceed with its motion for a modification of the protective order, but then held that Bohack was not entitled to obtain the documents covered by the protective order from Bagley. (Pet. App. 1a-4a.) Chief Judge McManus specifically noted that the Eighth Circuit had ruled that this earlier modification of the protective order to permit the House Small Business Subcommittee to obtain them was an abuse of discretion and had instructed him not to modify the protective order again without following the considerations discussed in its opinion.[1] The Court of Appeals had stressed that the protective order was initially granted because "any further disclosure would unduly harm IBP" and there had been no showing "that intervening circumstances had in any way obviated the potential prejudice to IBP" from further disclosure of the documents. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 954 (8th Cir.), *cert. denied*, 441 U.S. 907 (1979). The Eighth Circuit also held that the Bagley documents were inseparably intertwined with the underlying merits of IBP's lawsuit and the relief that it sought:

> [T]he documents ordered disclosed to the Subcommittee were an important part of the subject matter of the underlying lawsuit. That is, IBP alleged that Bagley had breached both contractual and fiduciary obligations to IBP by disclosing the contents of

[1] The Eighth Circuit had ruled that it lacked jurisdiction over IBP's appeal from the order modifying the protective order because it was not "final" under 28 U.S.C. § 1291, but it proceeded to the merits of IBP's alternative petition for mandamus. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 952-954 (8th Cir.), *cert. denied*, 441 U.S. 907 (1979).

> these documents and sought an injunction preventing further disclosure and compelling the return to IBP of all such documents. In these circumstances, the district court should have maintained the status quo by carefully limiting disclosure of these documents pending determination of the merits of IBP's claim. The Court's order allowing disclosure to the Subcommittee, without any limitation on its use of the documents, could well render moot in part IBP's claims for relief in the underlying lawsuit. [*Ibid.*, footnote omitted.]

The District Court held that this Eighth Circuit ruling applied also to Bohack's effort to get the documents and thus denied its motion to modify the protective order.

Bohack then appealed to the Eighth Circuit, which held that the order denying modification of the protective order was not final for appellate jurisdiction under 28 U.S.C. § 1291 and that Bohack had not sought certification of an interlocutory appeal under 28 U.S.C. § 1292(b). Consequently, the appeal was dismissed for lack of jurisdiction. *Iowa Beef Processors, Inc. v. Gorman*, 615 F.2d 777, 778 (8th Cir. 1980); Pet. App. 13a-15a. Bohack did not petition for rehearing.

THE REASONS FOR DENYING THE WRIT

Bohack's contentions in support of its petition are ambiguous. At times (Pet. 7, 9) it appears Bohack is suggesting that the Eighth Circuit's ruling that it lacked appellate jurisdiction conflicts with holdings of other circuits. But at other times (Pet. 8-9) Bohack seems to acknowledge that the Eighth Circuit agreed with the holdings of the other circuits but found the circumstances here distinguishable. But whichever way one reads Bohack's arguments, the petition is uncertworthy.

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS

Bohack relies upon several decisions upholding a narrowly limited exception to the general rule that discovery decisions are interlocutory and nonappealable. But each of these decisions[2] involved a situation in which a party in litigation in one district had subpoenaed a non-party residing in another district for deposition testimony or document production or both. A controversy arose between the party seeking the discovery and the non-party, and a proceeding was filed in the district court that had issued the subpoena to resolve the objections that had been raised. The district court ruled

[2] *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 227-229 (9th Cir. 1975); *Ochsner v. Millis*, 382 F.2d 618, 620-622 (6th Cir. 1967); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 554-555 (2nd Cir. 1967); *Carter Products, Inc. v. Eversharp, Inc.*, 360 F.2d 868, 870-872 (7th Cir. 1966); *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762, 765-766 (D.C. Cir. 1965); *Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421, 422-424 (1st Cir. 1961).

against the party seeking discovery, that party took an appeal, and the court of appeals upheld its jurisdiction under 28 U.S.C. § 1291. In each instance, the district court's decision was the *final* decision in the only litigation pending before it, viz., the proceeding to enforce the subpoena.

Here, the Eighth Circuit cited three of these decisions, did not disagree with them on their facts, but held that this case was distinguishable:

> We believe, however, that this is not an appropriate case to apply the exception. The issues raised here are closely akin to those presented in the underlying litigation and only recently considered by this court in *Iowa Beef Processors v. Bagley, supra.* [*Iowa Beef Processors, Inc. v. Gorman, supra*, 615 F.2d at 778 n.2; Pet.App. 15a n.2.]

The Eighth Circuit was clearly correct in holding that the decisions cited by Bohack were based upon entirely different circumstances. In none of them did the party seeking discovery intervene in other on-going litigation and try to upset a protective order which was closely related to the merits of the lawsuit and was necessary to protect a litigant from damage pending decision on the merits of its claims. Unlike the cases relied upon by Bohack, the District Court's decision here did not terminate the litigation pending before it and involved the rights of a third party (IBP). While Bohack attempts to portray its motion as simply an ancillary discovery proceeding to its own Robinson-Patman case in New York, in fact a modification of the protective order in this case risked mooting IBP's claim for injunctive relief and threatened IBP with irreparable injury.

Therefore, Bohack's contention that there is a conflict among the circuits on the jurisdiction point decided by

the Eighth Circuit is wholly unfounded. Nor did that Court exercise "discretion" in finding no jurisdiction, as Bohack asserts. Rather, the Eighth Circuit followed the finality rule because no exception was applicable.

II.

THE DISTRICT COURT'S DECISION WAS NOT A FINAL ORDER

Bohack argues that the Eighth Circuit failed to consider the prejudice to Bohack from denying immediate review of the District Court's refusal to lift the protective order. However, a heavy burden was placed upon Bohack to demonstrate that the order appealed from was "final" under § 1291, which was enacted by Congress to prevent burdening the appellate courts with interlocutory matters. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978). Bohack completely failed to carry that burden since it could not refute IBP's argument, earlier validated by the Eighth Circuit, that further modification of the protective order would jeopardize IBP's very claims in this litigation. Since the protective order is interwoven with the merits of the underlying litigation, Bohack's appeal was truly interlocutory. In addition, Bohack chose not to justify an interlocutory appeal under 28 U.S.C. § 1292(b) and did not petition for a writ of mandamus. Consequently, appellate review must wait until the merits of the underlying litigation are fully decided. See *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 746 (1976).

III.

THE PETITION RAISES NO ISSUES OF GENERAL APPLICABILITY OR INTEREST

If this Court were to grant certiorari, the question before it would be whether Bohack's motion to modify the protective order was so intimately related to the merits of IBP's case that review prior to a final judgment on IBP's claims would violate the rule against interlocutory appeals. Plainly, this question has no significance outside the boundaries of this litigation and involves the type of issue designed for review by the courts of appeals rather than this Court. It would require a detailed familiarity with the legal issues raised in this case and in Bohack's antitrust case and the facts revealed by discovery to date, including the contents of Bagley's documents, an appraisal of their confidential status and their relevance, if any, to Bohack's case, and an assessment of the prejudice to IBP if further disclosure were allowed. The District Court has acquired such familiarity over the course of this litigation, and the Eighth Circuit has now reviewed the protective order on two separate occasions. There is simply no reason for this Court to submerge itself in the extensive record only to substitute its judgment on these specific matters for that of the Court of Appeals.

CONCLUSION

The Eighth Circuit decision is fully consistent with the case law from other circuits and was a routine denial of appellate jurisdiction to an interlocutory issue having no general legal significance or applicability. Bohack's arguments were thoroughly considered by both the District Court and the Court of Appeals and were rejected. Consequently, IBP asks that the petition be denied.

Respectfully submitted,

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